



IN THE

Supreme Court of the United States

October Term, 1942

No.

MARTIN M. GOLDMAN and JACOB P. SHULMAN,
Petitioners,
against

SIDNEY C. MIZE, United States District Judge for the
Southern District of Mississippi,
Respondent.

**PETITIONERS' BRIEF IN SUPPORT OF MOTION
FOR LEAVE TO FILE PETITION FOR WRIT
OF MANDAMUS AND IN SUPPORT OF
SAID PETITION**

*To the Honorable Harlan Fiske Stone, Chief Justice of the
United States, and to the Associate Justices of the
Supreme Court of the United States:*

Your petitioners have filed in this Court the following:

1. Motion for leave to file petition for writ of mandamus.
2. Petition for writ of mandamus, with exhibits thereto annexed.
3. This brief.

The single question presented by this petition relates to the jurisdiction of respondent as a District Judge who, while sitting by assignment in another district, presided on the trial of and sentenced petitioners, to determine on the merits, after the expiration of his assignment and his return to his home district, an application for reargument, rehearing and reconsideration of his original denial of probation.

Jurisdiction

The jurisdiction of this Court is invoked under United States Code, Title 28, Sec. 342 (Judicial Code, Sec. 234), as construed in *Los Angeles Brush Mfg. Corp. v. James*, 272 U. S. 701, 71 L. Ed. 481, where the Court wrote, by Mr. Chief Justice TAFT:

“In *Virginia v. Rives*, 100 U. S. 313, 323, 25 L. Ed. 667, 671, Mr. Justice Strong, speaking for the court in reference to writs of mandamus which the Supreme Court might issue, said:

“‘In what case such a writ is warranted by the principles and usages of law it is not always easy to determine. Its use has been very much extended in modern times, and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do.’”

It is further established that mandamus is issued on the application of a party who has a clear right but no adequate remedy. *Ex parte Cutting*, 94 U. S. 14, 24 L. Ed. 49. It is available though the aggrieved party might also be entitled to appeal. *In re Winn*, 213 U. S. 458, 53 L. Ed. 873. Mandamus lies to compel the lower court to take jurisdiction. *Chicago & A. R. Co. v. Wiswall*, 23 Wall. (90 U. S.) 507, 23 L. Ed. 103; *Ex parte Schollen-*

berger, 96 U. S. 369, 24 L. Ed. 853; *In re Pennsylvania Co.*, 137 U. S. 451, 34 L. Ed. 738; *In re Hohorst*, 150 U. S. 653, 37 L. Ed. 1211. If the lower court erroneously declines to take jurisdiction, mandamus lies to compel it to proceed to a determination. *In re Grossmayer*, 177 U. S. 48, 44 L. Ed. 665. "Repeated decisions of this court have established the rule that this court has power to issue a mandamus, in the exercise of its appellate jurisdiction, and that the writ will lie in a proper case to direct a subordinate Federal court to decide a pending cause." *McClellan v. Carland*, 217 U. S. 268, 54 L. Ed. 762.

The Issue

The precise issue presented by the motion and the petition herein is this:

Where a district judge of the United States has been assigned to another district, there presides at a criminal trial and imposes sentence on a defendant, whom he thereupon declines to admit to probation, may that judge, after the expiration of his assignment and his return to his home district, determine an application by the defendant for reargument, rehearing and reconsideration of the original denial of probation?

ARGUMENT

I

The statute as to powers of assigned judges (United States Code, Title 28, Sec. 22), prior to its recent amendment, read, so far as pertinent, as follows (and this language continues unchanged):

"Any designated and assigned judge who has held court in another district than his own shall have the

power, notwithstanding his absence from such district and the expiration of the time limit in his designation, to decide all matters which have been submitted to him within such district, to decide motions for new trials, settle bills of exceptions, certify or authenticate narratives of testimony, or perform any other act required by law or the rules to be performed in order to prepare any case so tried by him for review in an appellate court; and his action thereon, in writing filed with the clerk of the court where the trial or hearing was had, shall be as valid as if such action had been taken by him within that district and within the period of his designation."

A leading and frequently cited (and invariably approved) case is *United States v. Goldstein* (C. C. A. 8) 271 F. 838. There a Federal district judge, who heard a cause and entered a judgment while sitting by assignment in another district, was held to have the power three years and three months thereafter to hear and determine a motion for modification of such decree while he was sitting in his own district, and the modified decree thus rendered was held to be valid and effective. In that case, the original decree adjudged and found defendant Goldstein guilty of the commission of fraud, perjury and deceit. This was modified so that the defendant was exonerated from having knowingly testified falsely as recited in the original decree. That holding, as a study of the case indicates, goes far beyond the mere reconsideration and reargument sought herein.

The fact that the statute goes so far as explicitly to specify the power "to decide motions for new trials" evidences a plain legislative intent to permit reargument of a motion made at the trial. In view of the general principle that a motion for reargument is regularly and necessarily heard by the same judge as decided the original motion, it is hard to conceive that Congress did not intend to embrace the present situation within the language "to

decide all matters which have been submitted to him within such district." Since a motion for a new trial would seem to go beyond less important motions (as for reargument), it was quite manifestly deemed unnecessary to specify such motions expressly.

II

Respondent's opinion cited only the holding in *Frad v. Kelly*, 302 U. S. 312, 82 L. Ed. 282, and he appeared to consider that case as conclusive that he lacked the requisite power. However, that case holds the following and nothing more:

"An application for the termination of the probation and the proceedings against a defendant constitutes a new matter, submission of which may not be made to the assigned judge after his return to his own district."

The Court plainly declares that only the local judge can "supervise, extend, modify or terminate the probation," but it is noteworthy that the verb "grant" is omitted from the foregoing enumeration on page 318 of the opinion. The radically disparate character of a proceeding to terminate probation and the need for an independent inquiry on that subject are thoroughly explained in *Escoe v. Zerbst*, 295 U. S. 490, 79 L. Ed. 1566.

The one time limitation on the power of the trial judge to admit to probation pursuant to the broad remedial provisions of the Federal Probation Act (United States Code, Title 18, Sec. 724), is that the grant of probation must be made before the actual commencement of the execution of the sentence. This is the rule of *United States v. Murray*, 275 U. S. 347, 359, which, incidentally, cites as consistent with its ruling, the holding in *Ackerson v. United States* (C. C. A. 2), 15 F. 2d 268, wherein successive applications for probation by the same defendant are held to be proper.

III

From the standpoint of familiarity with the facts and with the propriety of probation as affecting particular defendants, there can be little doubt that, *ceteris paribus*, the trial judge is best qualified to pass on the application. To illustrate, the trial of the instant case consumed some ten days and each of the petitioners testified at length. The present determination of an application to be admitted to probation depends upon the consideration of composite factors: the evidence brought out on the trial, factors of innocence or relative culpability, the type of men the petitioners were shown to be (in short, every element bearing upon the appropriate sentence) plus events occurring since the trial, such as changes in the circumstances of the petitioners, the military status of themselves or their children, the deprivation of their law practice by the conviction, the humiliation and other punishment they have already suffered (in other words, the recognition that the theory of the probation law, as outlined in *United States v. Murray*, 275 U. S. 347, 72 L. Ed. 309, rests upon the existence of a *locus poenitentiae* between conviction and imprisonment). Any attempt to segregate the two sets of factors, or to give the trial judge jurisdiction when the motion is based on events before sentence and to deprive him thereof when subsequent considerations are adduced, will involve the courts in impractical niceties of dialectics and tend towards an inequitable administration of the probation statute. Indeed, it must be appreciated that the variety of reasons underlying the desirability of probation is such and they are so interrelated that no good purpose could possibly be served by directing their differentiation.

IV

On December 29th, 1942, the statute relating to assigned judges (United States Code, Title 28, Sec. 22) was amended so as to permit the assignment to other circuits of judges of circuit courts of appeals. While this does not directly involve respondent or the question now being argued, the language of the amendment and the tenor of the committee discussions are such as to shed much light on the issue.

The amendment, *inter alia*, adds the following sentence *immediately following* the sentence (relating to district judges) quoted at pages 21-22 of this brief:

“Likewise, any designated or assigned circuit judge who has served temporarily in a circuit court of appeals other than his own shall have the power, notwithstanding his absence from such circuit or the expiration of the time limit in his designation, to join as an associate circuit judge in the decision and final disposition of all matters submitted to him and his associate judges in such circuit court of appeals, and to join in the consideration and disposition of any petition for rehearing, or any motions, petitions, or further proceedings in respect of any submitted cause in the decision and disposition of which he has participated.”

Thus the amendment dealing with circuit judges gives them plenary power, notwithstanding their absence from the visited circuit and the expiration of the time limit in their designation, to join in petitions for rehearings or any motions, petitions or further proceedings in respect of any submitted cause in the decision of which they have participated. To be sure, if like language were employed in the preceding sentence dealing with district judges, there

would be little doubt that this would constitute a precise enactment in favor of the exercise by respondent of his power. Despite the difference in language, it seems reasonably clear that the identical result is intended, as we shall attempt to show.

The amendment quoted above immediately follows the sentence dealing with district judges and begins with the word "Likewise." This indicates a legislative intent to establish a uniform rule with regard to circuit judges and district judges.

The reason why, in dealing with circuit judges, Congress explicitly mentioned rehearings and further proceedings was simply this: even in the absence of a quondam assigned circuit judge, the two remaining members of any circuit court of appeals would constitute a quorum and would be able to perform judicial acts. Therefore, in order to make it abundantly clear that the third judge is authorized to participate in applications for rehearing or further proceedings, the statute so declares *in haec verba*. With regard to a district judge, who himself constitutes a court, no such declaration appears necessary.

In order to clarify the Congressional intent, we respectfully refer the Court to the official report of the only hearing on the subject, described as "Hearing before a subcommittee of the Committee on the Judiciary, United States Senate, 77th Congress, Second Session, on S. 2655, a Bill to amend the Judicial Code to authorize the Chief Justice of the United States to assign circuit judges to temporary duty in circuits other than their own, July 30, 1942." The first witness to testify before the subcommittee was Mr. Chief Justice GRONER of the Court of Appeals of the District of Columbia, who said (pp. 3, 4):

"The bill has a single purpose, and that purpose can be stated shortly to be to apply the present law in relation to the transfer of judges of the United States district courts in the case of judges of the United States circuit courts. * * *

“But now getting back to my main thesis, the purpose of the present bill is to apply that provision of law as it relates to district judges to the case of circuit judges. * * *”

He then proceeded to discuss the action taken by the judicial conference, thus (p. 4):

“The matter is not one of first impression. It has been under consideration—its practicability, its feasibility, its workability, and all the various aspects which might be properly considered, have been thought over, and at the last meeting of the judicial conference of senior circuit judges, which is required by law to meet annually in the city of Washington under the presidency of the Chief Justice of the United States, at that conference the matter was thoroughly discussed and a resolution adopted, which is included in the report of the Chief Justice of the September session 1941, of the judicial conference, and which reads as follows:

“The conference resolved that legislation was desirable authorizing the Chief Justice to assign circuit judges to temporary duty in circuits other than their own, the procedure of assignment to conform to that of existing legislation relating to the assignment of district judges to districts outside their circuits.’”

Senator Danaher, the Chairman, read into the record the annotated draft of the bill as prepared by a distinguished committee of the American Bar Association (pp. 5-8), in which annotations the committee says with regard to the old law dealing with district judges:

“Subsection (c) is the third paragraph of 28 U. S. C. A. 22 verbatim. It is limited in application to district judges and district courts. The same subject

matter insofar as circuit judges are concerned is covered by proposed subsection (d)."

And as to the latter subsection, it says:

"Subsection (d) is new. It is designed to cover in the case of a temporarily assigned circuit judge the subject matter of subsection (c) which applies only to district judges."

Mr. Chief Justice GROVER also read into the record (pp. 8-9) the explanatory statement submitted by the Bar Association committee on jurisprudence and law reform, wherein the following declaration appears:

"It is attempted in the proposed bill to extend and apply to the circuit courts, with no change, the existing provisions of the code relative to district courts.

"In the interest of avoiding unnecessary judicial interpretation, and in the interest of retaining the benefit of the body of judicial opinion which has grown up under the present provisions respecting district courts, the proposed bill leaves them untouched, and merely adopts for circuit courts the present wording of the district court provisions. This was the recommendation of the judicial conference."

We shall not unduly protract this brief by further quotation from this hearing report, but it appears elsewhere therein (*e. g.*, pp. 9, 11, 14-15, 16) on eminent authority that the purpose of the amendment was absolutely to assimilate the practice already existing as to district judges to the new case of circuit judges.

CONCLUSION

In the light of the foregoing, it is respectfully urged that respondent was in error in declining to assume jurisdiction of the application.

Wherefore, your petitioners pray that this Court issue a writ of mandamus directed to respondent, ordering him to take plenary jurisdiction in the premises.

Dated New York, N. Y., March 6th, 1943.

Respectfully submitted,

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Attorney for Petitioners.